

CHAPTER VI.

THE VERDICT, SENTENCE AND PETITION.

With the loud and repeated denunciations of this elaborate and vindictive harangue, full as it was of rhetorical appeals to the members of the Commission to avenge the murder of "their beloved Commander-in-Chief," and of repeated and most emphatic assurances of the undoubted guilt of each and every one of the prisoners, as well as of all their alleged accomplices, still ringing in the ear of the Court; the room is for the last time cleared of spectators, counsel for the prisoners and reporters; the mournful procession of the accused marches for the last time from the dock to their solitary cells, their fetters clanking as they go; and the Commission meets to deliberate upon its verdict. But who remains in the room, meets with the Court and participates in its secret and solemn deliberations? Who but Colonel Burnett, the officer who had so zealously conducted the preliminary examinations of the witnesses and marshalled the evidence for the prosecution? Who but Recorder Joseph Holt, the head of the Bureau of Military Justice, the left hand of Stanton as Baker was his right? Who but John A. Bingham, the Special Judge-Advocate, who had so mercilessly conducted the trial, assailing counsel, browbeating witnesses for the defense, declaring that all participants in the rebellion were virtually guilty of the assassination, and who had just closed his long speech, in which he had done his utmost to stir up the Commission to the highest pitch of loyalty, unreasoning passion and insatiable desire for

vengeance?

Where can we look in the history of the world for a parallel to such a spectacle? A woman of refinement and education, thrown together in one mass with seven men, to be tried by nine soldiers, for the crime of conspiring with Jefferson Davis, the arch-enemy of every member of the tribunal, to kill, and killing, the beloved Commander-in-Chief of every member of the tribunal; three experienced criminal lawyers eagerly engaging in the task of proving her guilty; pursuing it for days and weeks with the unrelenting vigor of sleuth-hounds; winding up by reiterating in the most solemn manner their overwhelming conviction of her guilt; and then all three being closeted with the Court to take part in making up the doom of death!

And here let us pause to consider one feature of the trial and of the summing up of Judge Bingham, which has not yet been noticed because it deserves special and prominent remark.

It appeared from the testimony on the part of the prosecution, unmistakably, that, during the fall of 1864 and the winter of 1864-5, Booth was brooding over a wild plot for the capture of the President (either on one of his drives, or in the theatre, where the lights were to be turned off), then hurrying off the captive to lower Maryland, thence across the Potomac, and thence to Richmond; thereby to force an exchange of prisoners, if not, possibly, a cessation of the war. It was a plot of the kind to emanate from the disordered brain of a young, spoiled, dissipated and disappointed actor. During this period, Booth made some

trifling and miserably inadequate preparations, and endeavored to enlist some of his associates in its execution; and, by his personal ascendancy over them, he did in fact entangle, in a more or less vague adhesion to the plot, Arnold, O'Laughlin, Atzerodt, Payne, Herold, John H. Surratt, Lloyd, and, possibly, Dr. Mudd and Weichman.

On the fall of Richmond, and the surrender of Lee, this any-how impracticable scheme was necessarily abandoned. Indeed, the proof showed that Arnold and O'Laughlin had deserted their leader some time before.

It further appeared in the testimony that it was not until after the forced abandonment of this plot and the desertion of most of his adherents, that Booth, plunged as he was into the depths of chagrin and despair because of the collapse of the rebellion, suddenly, as a mere after-thought, the offspring of a spirit of impotent revenge, seized upon the idea of murder, which was not in fact brought to the birth until the afternoon of the fourteenth, when he was first informed of the promised attendance of President Lincoln and General Grant at the theatre. Now, the existence of the plot to capture, although it looked forth from the evidence steadily into their faces, the Judge-Advocates bound themselves not to recognize. In the first place, such a concession would forever demolish the preconceived theory of the Secretary of War, Colonel Baker and the Bureau of Military Justice, that the conspiracy to murder emanated from the Confederate Government through its Canadian agents, by pointing directly to another plot than the one to kill as that in which these agents had been interested. The horrid monster of a widespread, treasonable conspiracy to overthrow the government, which had been

conjured up in the imagination of the Secretary of War and then cherished in the secret recesses of the Bureau of Military Justice, would have immediately shrunk into the comparatively simple case of an assassination of the President and an attempted assassination of the Secretary of State, by two worthless villains suddenly seizing opportunity by the forelock to accomplish their murderous purpose. And, in the next place, the concession of such a plot as a fact would go far to establish the innocence of Mrs. Surratt, Arnold, O'Laughlin and Mudd, as well as that of John H. Surratt, by explaining such suspicious circumstances as the frequent rendezvous of Booth, Payne and others at Mrs. Surratt's house, which practice, as it was proved, ceased altogether on the fall of Richmond and the immediate departure of the son to Canada. To the Judge-Advocates, if not to the Court, any evidence looking towards innocence was most distasteful and unwelcome. They were in no mood to reconcile what they considered the damning proofs of a conspiracy to kill their "beloved Commander-in-Chief" with the innocence of the fettered culprits before them, by admitting a plot to capture, into which nevertheless those same proofs fitted with surprising consistency. Besides, in the eyes of Bingham and Holt, complicity in a plot to capture, although unexecuted, was proof of complicity in the plot to murder, and also of itself deserved death. In this direction, therefore, the Judge-Advocates were mole-eyed. On the contrary, they hailed the slightest indication of guilt with a glow of triumph. In the direction of guilt, they were lynx-eyed.

Consequently, they bent every energy to identify the plot to capture with the plot to kill. They introduced anonymous letters, dropped letters; a letter mailed nearly a month after the assassination directed to J. W. B.;

a letter in cipher, purporting to be dated the day after the assassination, addressed to John W. Wise, signed "No Five," found floating in the water at Morehead City, North Carolina, as late as the first of May; this last, the most flagrant violation and cynical disregard of the law of evidence on record.

They did more. They labored to keep out all reference to the plot to capture. And it was for this reason, that the Judge-Advocates deliberately suppressed the diary found on the body of Booth. Its contents demonstrated the existence of the plot to capture.

Instead of allowing the officer who testified to the articles taken from the dead body of Booth to make a detailed statement in response to one general question as to what they were, the examining counsel shows him first the knife, then the pistols, then the belt and holster, then a file with a cork at one end, then a spur, then the carbine, then the bills of exchange, then the pocket-compass; following the exhibition of every article with the interrogatory, "Did you take this from the corpse of the actor?" But no diary was exhibited or even spoken of, although, as has been mentioned, it was carried by this same officer and Colonel Baker to Secretary Stanton on the night following the capture. That these Judge-Advocates had carefully searched through the diary for items they could use against the prisoners, is shown by their calling one of the proprietors of the "National Intelligencer," as a witness, to contradict the statement that Booth had left a written article, setting forth the reasons for his crime, for publication in that paper--a statement found only in the diary whose very existence they kept secret.

Therefore, when Judge Bingham came to review the evidence, he utterly refused to recognize in the testimony any such thing as a plot to capture; he shut his eyes to it and obstinately ignored it; he scornfully swept it aside as an absurdity it would be waste of time to combat; and he twisted every circumstance which looked to a connection, however remote, with an abandoned plot to kidnap, into a proof, solid and substantial, of complicity in the plot to murder.

And, therefore, when this same thorough-going advocate, with his two emulous associates, proceeded in secret conclave with the members of the Commission to go over the testimony for the purpose of making up their verdict and sentence, he summarily stifled any hint as to the possibility of a plot to capture; he banished from the minds of the Court, if they ever entertained such a purpose, any attempt to reconcile the circumstantial evidence with the existence of such a plot; and, besides, he held it up to the condemnation of those military men as equally heinous and as deserving the same punishment as the actual assassination.

Thus, the presence of these prosecutors during the deliberations of the Court must have exerted a deadly influence (if any influence were necessary) against the prisoners, and benumbed any impartiality and freedom of judgment which might otherwise have lodged in the members of the Commission.

The Commission, with its three attending prosecuting officers, held two secret sessions--Thursday and Friday, the 29th and 30th of June; on the

first day from 10 o'clock in the morning until 6 o'clock in the evening, on the second day, probably, during the morning only. The record of the proceedings is meagre, but contains enough to show the lines of the discussion which, in such an unexpected manner through one whole day, prolonged the deliberations of a tribunal organized solely to obey the predetermination of a higher power, and even made necessary an adjournment over night.

There was no difficulty with the verdicts, except in the case of Spangler, over the degree of whose guilt a majority of the Commission presumed for the first time to differ with the Judge-Advocates. They would unite in a conviction of the crime of assisting Booth to escape from the theatre with knowledge of the assassination, but they would go no farther. They would not find him a participant in the "traitorous conspiracy." This poor fellow, as we can see now, was clearly innocent of the main charge; but that was no reason, then, why the Commission should find him so. There was more testimony pointing to his complicity with Booth on the fatal night than there was against Arnold or O'Laughlin or even Mrs. Surratt; and Judge Bingham, the guardian and guide of the Court, had pronounced it "Conclusive and brief." The testimony of the defense, however, appears overwhelmingly convincing, and, moreover, his case was admirably managed by General Ewing.

For all the rest there was no mercy in the verdict. Every one was found guilty of the charge as formulated (eliminating Spangler); that is, in the judgment of the Commission, they had, each and all, been engaged in a treasonable conspiracy with Jefferson Davis, John H. Surratt, John Wilkes

Booth and the others named, to kill Abraham Lincoln, President, Andrew Johnson, Vice-President, Wm. H. Seward, Secretary of State, U. S. Grant, Lieutenant-General; and that in pursuance of such conspiracy they (the prisoners) together with John H. Surratt and J. Wilkes Booth, had murdered Abraham Lincoln, assaulted with intent to kill W. H. Seward, and lain in wait with intent to kill Andrew Johnson and U. S. Grant.

This was the deliberate judgment of the Commission as guided by Judge-Advocates Holt, Burnett and Bingham. With the same breath with which they pronounced the guilt of Mrs. Surratt, they pronounced also the guilt of her son, of Jefferson Davis, of Clement C. Clay, of George H. Sanders, of Beverly Tucker. And there can be no doubt that if these men had also been upon trial, they all would have been visited with the same condemnation and would have met the same doom.

The Commission, further, found Herold, Atzerodt, Payne and Arnold guilty of the Specification as formulated (eliminating Spangler); Mrs. Surratt guilty, except that she had not harbored and concealed Arnold or O'Laughlin; Dr. Mudd guilty, except that he had not harbored or concealed Payne, John H. Surratt, O'Laughlin, Atzerodt or Mrs. Surratt; and, strangest of all, they found O'Laughlin guilty of the Specification, except that he had not lain in wait for General Grant with intent to kill him, which was the very part in the conspiracy he was charged in the Specification with having undertaken. It should be recollected that, in the first moments of the panic succeeding the assassination, Stanton and his subordinates had included among the objects of the conspiracy, as if to complete its symmetry, the murder of the Secretary of War, himself.

Afterwards, probably because of the attitude of Stanton relative to the prosecution, Grant was substituted as the victim of O'Laughlin and not of Booth; Stanton's son having discovered a resemblance of the captured O'Laughlin to the mysterious visitor at his father's house during the serenade on the night of the 13th of April, when General Grant was also present. This pretty romance, the testimony on behalf of O'Laughlin effectually dissipated on the trial, but the indomitable Bingham still insisted on holding the prisoner to a general complicity with the plot. In this instance, as well as in that of Spangler, there may have been some dissension between a majority of the officers and the Judge-Advocates, but, taken altogether, the eight verdicts could not have cost the Commission much time. It was organized to convict, and it did convict.

So that it was not until the Court, having made up its verdicts, proceeded to affix its sentences, that the three advocates, still assisting at the work of death, encountered the unforeseen difficulties which compelled a prolongation of the session. The crime or crimes of which the prisoners were all pronounced guilty (with the possible exception of Spangler's) were capital, and the Secretary of War, on the eve of the assembling of the Commission, had already denounced against such offenses (not excepting Spangler's) the punishment of death.

The sentence, however, under the rules governing military commissions, was wholly within the power of the Court, which, no matter what the nature of the verdict, could affix any punishment it saw fit, from a short imprisonment up to the gallows. Its two-fold function was, like a jury to find a verdict, not only, but, like the judge in a common-law court, to

pronounce sentence; and, unlike such a judge, in pronouncing sentence, the Commission was confined within certain limits by no statute. Although the whole proceedings of the Court must be subjected to the final approval of the President, yet its members were clothed alike with the full prerogative of justice and the full prerogative of clemency. There was one limit, however. While a majority could find the verdict and prescribe every other punishment, it required two-thirds of the Commission to inflict the penalty of death. Four officers, therefore, could block the way to the scaffold, and five could mitigate any sentence, to any degree, and for any, or for no reason.

The Commission must have taken up the cases for sentence in the order adopted in the formal Charge. As to the first three--Herold, Atzerodt and Payne--there could have been no dissent or hesitation. The Commission, with hardly a moment's deliberation, must have ratified the judgment of the Judge-Advocates and condemned the prisoners to be hung by the neck until dead. The sentences of death formally declare in every instance that two-thirds of the Commission concur therein, but, as to these three, we can scarcely be in error in stating the Court was unanimous. It was not until the cases of the next three--O'Laughlin, Spangler and Arnold--were reached, that symptoms of dissatisfaction with the sweeping doom of death, so confidently pronounced by Judge Bingham in his charge, first began to show themselves amongst the members of the Court. It seems that now, after having joined with the counsel in pronouncing capital punishment upon the three most prominent culprits, the majority could no longer whet their appetite for blood so as to keep it up to the same fierce edge as that of the Judge-Advocates.

The deviations from the Charge and Specification, the Court had finally prescribed in the verdicts against O'Laughlin and Spangler, were not thought by the prosecutors to be of such importance as to warrant a softening of the sentence. But here the loyalty of some members of the Commission began to falter, and refuse to bear the strain. They had found O'Laughlin guilty of the "traitorous conspiracy," and Spangler guilty of aiding Booth to escape, and Arnold guilty in the same degree as Herold, Atzerodt and Payne, but in none of these cases could the attending advocates extort a two-thirds vote for death. In the case of Spangler, owing, it is said, to the impression made by General Ewing and the influence of General Wallace, they were compelled to allow a sentence of but six years imprisonment. And in the case of the two others--convicted co-conspirators with Booth and Davis though they were--these prosecuting officers had to rest satisfied with but life-long imprisonment.

It was too evident that five members of the Commission had slipped the bloody rein. Three lives had they taken. Henceforth they would stop just this side the grave.

At this point--when the Commission had sentenced to death three men and had just declined to sentence to death two more whom it had pronounced guilty of the same crime--at this point it was, that the sentence of Mary E. Surratt came up for determination.

Now, the crimes of which Arnold had been found guilty were both in law and in fact the same of which she had been found guilty. Even the particular

allegation in the Specification is the same in both cases, except some immaterial variance in the verbiage and in the names of co-conspirators.

Of course, it will be presumed that the Commission had found the woman guilty without being pressed. But, equally of course, it will not be doubted that, in determining the sentence which should follow the verdict, the question of exercising the same mercy as the Commission had just exercised in the case of a man convicted of the same crime, must have arisen in the case of the woman. And, the question once having arisen, the first impulse of the majority, if inclined still to mercy, must have been to exert their own unquestioned function, and, as in the other cases, mitigate the sentence themselves. They would have, originally, no motive to thrust upon the President, who was to know comparatively nothing of the evidence, the responsibility of doing that thing, which they themselves who had heard the whole case thought ought to be done, and which in a parallel case they had just done. Even if they believed the woman's crime had a deeper tinge of iniquity than either Arnold's or Mudd's (of which the respective verdicts, however, give no hint), but that nevertheless her age and sex ought to save her from the scaffold, they need not have turned to the President for mercy on such a ground. The woman clothed upon by her age and sex had sat for weeks bodily before them. This very mitigation was what a majority of the Court had power to administer. The reason of the mitigation was a matter of no moment. The Court could commute for "age and sex" as well as the President, and, for that matter, could state the reason for the milder penalty in the sentence itself.

Therefore, it may be taken for granted that here the Judge-Advocates again

found that two-thirds of the Court would not concur in the infliction of the death penalty. Nay, that even a majority could not be obtained. Five out of the nine officers announced themselves in favor of imprisonment for life.

Here, indeed, was a coil! The prosecutors were at their wits' ends. And lo! when they passed on to consider the last case, that of Dr. Mudd, the same incomprehensible reluctance to shed more blood did but add to their discomfiture. The verdict indeed had been easily obtainable, but the coveted death-sentence would not follow. The whole day had been spent in these debatings. The expedient of adjourning over to the next day, perhaps, was now tried; and the dismayed Judge-Advocates, with but three out of the eight heads they had made so sure of, and their "female fiend" likely to slip the halter, hurry away to consult with their Chief.

Edwin M. Stanton, as he had presided over the whole preparatory process, so too had kept watch over the daily progress of the trial from afar. Every evening his zealous aide-de-camps made report for the day and took their orders for the morrow.

After the death of Booth and the escape of John H. Surratt, the condemnation to death of the mother of the fugitive had become his one supreme aim.

The condemnation of the other prisoners was to him either a matter of no doubt or was a minor affair. Three heads of the band of assassins stood out in bloody prominence--Booth, John H. Surratt and Payne. The first had

been snatched from his clutches by a death too easy. Payne, with hand-cuffs and fetters and chains and ball and hood, he might be confident, could not evade his proper doom. Surratt, by the aid of some inscrutable, malignant power, had contrived to baffle all the efforts of his widespread and mighty machinery of military and detective police. But he had the mother, the friend of Booth and the entertainer of Payne; and she, the relentless Secretary with his accordant lackeys had sworn, should not fail to suffer in default of the self-surrender of her son. She, moreover, was to be made an example and a warning to the women of the South, who, in the judgment of these three patterns of heroism, had "unsexed" themselves by cherishing and cheering fathers, brothers, husbands and sons on the tented field.

In the conclave which Stanton and his two co-adjutors held, either during the recesses of the prolonged session of the first day, or most likely during the night of the adjournment, it was resolved, that if the manly reluctance of five soldiers to doom a woman to the scaffold could be overcome in no other way, to employ as a last resort the "suggestion," that the Court formally condemn her to death, and then, as a compromise, the soft-hearted five petition the President to commute--the three plotters trusting to the chances of the future, with the petition in their custody and the President under their dominion, to render ineffectual this forced concession to what they scorned as a weak sentimentalism. This suggestion of what was in truth a most extraordinary device--a petition to the President to do what the Court could do itself--could not have emanated from the merciful majority of the Court, which subsequently did sign the fatal document. They, at least, were sincere, and, if let

alone, would have proceeded immediately to embody their own clemency in a formal sentence, as they had done with O'Laughlin and Arnold, and as they were about to do with Mudd. Had there been but one, or two, or three dissentients, so that they were powerless in the face of two-thirds of the Commission; or even had there been four--a number sufficient to block a death-sentence but not sufficient to dictate the action of the Court, then, indeed, recourse to the clemency of the Executive might have been a natural proceeding. But a clear majority had no need to look elsewhere for a power of commutation which they themselves possessed in full vigor, and which, in all probability, after the first three death-penalties, they had determined to apply in every one of the other cases. Neither could the suggestion have been made by one of the minority, because none of them signed the petition to the last. The four must have been steadfast and uncompromising for blood. The whole scheme proceeded from a quarter outside the Court--a quarter which, on the one hand, was possessed by an overmastering revengeful passion, such as was required to point the five officers to a seeming source of mercy to which they might appeal and thus avoid the exercise of their own prerogative in antagonism to their four brethren, and, on the other hand, harbored some secret knowledge or malign intent that the petition would or should be, in fact, an empty form; from a quarter, in short, where the desire for the condemnation to death of Mrs. Surratt was all-controlling and where the condition of the President was well known. They, who suggested the death-sentence and the petition as a substitute for the milder penalty, were surely all on the side of death, and hoped, if they did not believe, that the prayer of the petition would be of no avail; else they would not have adopted such a circuitous method to do what the five officers could immediately have accomplished

themselves. In one word, the contrivers of the device of petition were not those who desired to save the bare life of the convicted she-conspirator, but were those who would be satisfied with nothing less than her death on the scaffold. The suggestion was wholly sinister and malevolent. On the other hand, the majority of the Court did really desire that her punishment should not exceed that of Arnold, O'Laughlin and Mudd, and they certainly would never have had recourse to a petition to the President, had they not been cheated into believing that that method of proceeding was likely to effectuate what they had full power to do. Never would these five soldiers, or any two of them, have given their voices for the death of this woman, had they dreamed for a moment that their signing of the petition was, and was meant to be, but a farce. They would not have played such a ghastly trick under the shadow of the gibbet.

Accordingly, when the Commission reassembled, either after recess or adjournment, the reinvigorated counsellors immediately unfolded their plan. We can almost hear their voices, in that upper room of the Old Penitentiary, as they alternately urge on the Court. Holt, making a merit of yielding in the cases of Spangler, of O'Laughlin, of Arnold and of Mudd, denounces the universal disloyalty of the women of the South, and pleads the necessity of an example.

Bingham, holding up both mother and son as equally deep-dyed in blood with Booth and Payne, both insinuates and threatens at the same time, that, if "tenderness," forsooth, is to be shown because of the age and sex of such a she-assassin, then, for the sake of the blood of their murdered Commander-in-Chief, do not his own soldiers show it, but let his successor

take the fearful responsibility.

One of the five gives way, and now there is a majority for death. One more appeal! The life of the woman trembles in the balance. Once more to the breach! The supreme reserve is at last brought forward--an argument much in use with Judge-Advocates in cases of refractory courts-martial, as a last resort--that the President will not allow a hair of her head to be harmed, but that terror, TERROR, is necessary; in this instance, to force the son to quit his hiding place, the life of the mother must be the bait held out to catch the unsundering son. We will hang him and then free the woman's neck.

Another vote comes over. Two-thirds at last concur, and her doom is sealed. They sentence "Mary E. Surratt to be hanged by the neck until she be dead." Judge Bingham sits down and embodies the memorable "suggestion" in writing as follows:

[It is without address.]

"The undersigned, members of the Military Commission detailed to try Mary E. Surratt and others for the conspiracy and the murder of Abraham Lincoln, late President of the United States, &c., respectfully pray the President, in consideration of the sex and age of the said Mary E. Surratt, if he can, upon all the facts in the case, find it consistent with his sense of duty to the country, to commute the sentence of death, which the Court have been constrained to pronounce, to imprisonment in the penitentiary for life.

Respectfully submitted."

General Ekin copies it on a half-sheet of legal-cap paper, and the five officers, viz.: Generals Hunter, Kautz, Foster and Ekin, and Colonel Tompkins, sign the copy; General Ekin keeping the draft of Bingham as a memento of so gentle an executioner.

The Commission then proceeds to the next and last case, and, again exercising its prerogative of clemency, sentences Dr. Mudd to imprisonment for life. It is now Friday noon. The result of the two-days' secret session, consisting of a succinct statement of the verdict and sentence in every case, in the foregoing order, is redacted into a record. The presiding officer signs, and the Recorder countersigns it. It is placed in the hands of the Judge-Advocate, together with the petition to the President. There is an adjournment without day. The members disperse, and the work of the Military Commission is over.